

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

THOMAS EDWARD REDMOND, SR.

Plaintiff,

vs.

DR. RANTZ, et al.,

Defendants.

Cause No. CV 10-41-H-DWM-RKS

ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS AND
FINDINGS AND RECOMMENDATION TO
DISMISS COMPLAINT

This matter comes before the Court on Plaintiff Thomas Redmond's Motion to Proceed in Forma Pauperis (Court Doc. 1) and proposed Complaint alleging denial of medical care. (Court Doc. 2). This action presents a controversy over whether Defendants, acting under color of state law, violated Mr. Redmond's federal constitutional rights thereby subjecting Defendants to liability under [42 U.S.C. § 1983](#). Accordingly, the case presents a federal question over which the Court possesses jurisdiction pursuant to [28 U.S.C. § 1331](#).

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After conducting the prescreening process mandated by [28 U.S.C. § 1915](#) and [28 U.S.C. § 1915A](#), the Court finds that Mr. Redmond's claims are barred by the applicable statute of limitations. Therefore, the Court will recommend this case be dismissed.

I. MOTION TO PROCEED IN FORMA PAUPERIS

Mr. Redmond submitted a declaration and account statements sufficient to make the showing required by [28 U.S.C. §1915\(a\)](#). Accordingly, the request to proceed in forma pauperis will be granted. [28 U.S.C. § 1915\(a\)](#).

Pursuant to [28 U.S.C. § 1915\(b\)\(1\)](#), Mr. Redmond is required to pay the statutory filing fee for this action of \$350.00. Mr. Redmond submitted account statements showing average monthly deposits of \$96.06 over the six months immediately preceding the filing of this action. Therefore, an initial partial filing fee of \$19.21 will be assessed by this Order. [28 U.S.C. § 1915\(b\)\(1\)\(B\)](#) (allowing an assessment in the amount of 20% of the prisoner's average monthly deposits). By separate order, the Court will direct the appropriate agency to collect

the initial partial filing fee from Mr. Redmond's account and forward it to the Clerk of Court.

Thereafter, Mr. Redmond will be obligated to make monthly payments of 20% of the preceding month's income credited to Mr. Redmond's prison trust account. The percentage is set by statute and cannot be altered. See [28 U.S.C. § 1915\(b\)\(2\)](#). By separate order, the Court will direct the agency having custody of Mr. Redmond to forward payments from Mr. Redmond's account to the Clerk of Court each time the amount in the account exceeds \$10.00, until the filing fee is paid in full. [28 U.S.C. § 1915\(b\)\(2\)](#).

Mr. Redmond's Complaint shall be deemed filed as of the date the Motion to Proceed in Forma Pauperis was filed and the proposed complaint was delivered to the Clerk of Court. See [Loya v. Desert Sands Unified Sch. Dist.](#), 721 F.2d 279, 280-81 (9th Cir. 1983); see also [United States v. Dae Rim Fishery Co.](#), 794 F.2d 1392, 1395 (9th Cir. 1986) (concluding complaint constructively filed when delivered to clerk of court).

II. STATEMENT OF CASE

A. Parties

Mr. Redmond is a state prisoner proceeding without counsel. He is currently incarcerated at Montana State Prison.

The named Defendants are: Dr. Rantz, Dr. Evans, Dr. Kohut, Dr. Channer, and Ed Foley.

B. Allegations

Mr. Redmond had two hip replacement surgeries at Montana State Prison in 2005 and 2006. In August of 2006, he began to have severe pain in his right hip, the first hip to be replaced. His therapist at the prison notified Drs. Rantz and Evans that Mr. Redmond needed additional therapy and the current regime was insufficient to achieve a successful rehabilitation of the hip joints. The request for additional therapy was denied by Drs. Rantz and Evans, who stated they did not believe in therapy. Dr. Evans reportedly said her patients on the street rehabilitated themselves without assistance. (C.D. 2–Complaint, p. 5).

In September 2007, Mr. Redmond saw an orthopedic specialist, Dr. Sukin, who ordered x-rays and a bone scan of his hip joints. Dr. Sukin determined a part in Redmond's right hip was loose because he had not received the proper care and post-operative physical therapy. Id.

As a result, Mr. Redmond has not been able to get his hip repaired, he is disabled, he cannot work at his profession, and he is in constant pain. (Court Doc. 2—Complaint, p. 5).

III. SCREENING PER [28 U.S.C. § 1915\(e\)\(2\)](#)

A. Standard

As Mr. Redmond is a prisoner proceeding in forma pauperis, his Complaint is subject to screening under [28 U.S.C. § 1915](#) and [28 U.S.C. § 1915A](#). [Sections 1915A\(b\) and 1915\(e\)\(2\)\(B\)](#) allow for the dismissal of a complaint before it is served upon the defendants if it is "frivolous," "fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief."

To state a claim under [42 U.S.C. § 1983](#), a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

A complaint is frivolous if it "lacks an arguable basis either in law or in fact." [Neitzke v. Williams](#), 490 U.S. 319, 325, 109 S.Ct. 1827, 1831-32, 104 L.Ed.2d 338 (1989). A complaint fails to state a claim upon which relief may be granted if a plaintiff fails to allege the "grounds" of his "entitlement to relief." [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (quotation omitted). This requirement demands "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." [Twombly](#), 550 U.S. 544. A complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." [Erickson v. Pardus](#), 551 U.S. 89, 127 S.Ct. 2197, 2200,

[167 L.Ed.2d 1081 \(2007\)](#)(quoting [Bell, 127 S.Ct. at 1964](#) (quoting [Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 \(1957\)](#))).

Rule 8(a)(2) requires a complaint to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 \(2009\)](#) (internal quotation marks omitted). The "plausibility standard" is guided by "[t]wo working principles." [Iqbal, 129 S.Ct. at 1949](#). First, although "a court must accept as true all of the allegations contained in a complaint," that "tenet" "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." [Iqbal, 129 S.Ct. at 1949](#). "Second, only a complaint that states a plausible claim for relief survives" and "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." [Iqbal, 129 S.Ct. at 1950](#). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility

that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."

[*Iqbal*, 129 S.Ct. at 1949](#)(internal quotation marks and citation omitted.)

The court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." [*Iqbal*, 129 S.Ct. at 1950](#). Legal conclusions must be supported by factual allegations. [*Iqbal*, 129 S.Ct. at 1950](#). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." [*Iqbal*, 129 S.Ct. at 1950](#).

Even after *Twombly*, "[a] document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers'." [*Erickson*, 127 S.Ct. at 2200](#); Cf. [Fed.R.Civ.P. 8\(f\)](#) ("All pleadings shall be so construed as to do substantial justice.") If a plaintiff attaches documents to their complaint, the court is not limited

to the complaint and may consider these documents when determining whether the plaintiff can prove any set of facts in support of the claim.

During v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

Although the statute requires a dismissal for the reasons stated, it does not deprive the district court of discretion to grant or deny leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). The court can decline to grant leave to amend if "it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez*, 203 F.3d. at 1127 (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Leave to amend is liberally granted to pro se litigants unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (citing *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980)).

B. Statute of Limitations

Mr. Redmond's claims are barred by the applicable statute of limitations. The United States Supreme Court in *Wilson v. Garcia*, 471

[U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 \(1985\)](#) (later overruled only as to claims brought under the Securities Exchange Act of 1934, not applicable here), determined the applicable statute of limitations for claims filed pursuant to [42 U.S.C. § 1983](#) is the state statute of limitations governing personal injury actions. In Montana, that period is three years after the action accrues. [Mont. Code. Ann. § 27-2-204\(1\)](#). Mr. Redmond signed his original Complaint on August 15, 2010, accordingly, any claims arising prior to August 15, 2007 are barred by the statute of limitations.

Although the statute of limitations applicable to [§ 1983](#) claims is borrowed from state law, federal law continues to govern when a [§ 1983](#) claim accrues. [Wallace v. Kato, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973 \(2007\)](#); [TwoRivers v. Lewis, 174 F.3d 987, 991 \(9th Cir. 1999\)](#). Under federal law, a claim accrues “when the plaintiff knows or has reason to know of the injury which is the basis of the action.” [TwoRivers, 174 F.3d at 991](#); [Kimes v. Stone, 84 F.3d 1121, 1128 \(9th Cir. 1996\)](#).

Mr. Redmond's hip replacement surgeries occurred in 2005 and 2006. He alleges in August of 2006 he began to experience severe pain in his right hip, the first hip replaced. Sometime in 2006, a therapist told Redmond he needed additional therapy but Drs. Rantz and Evans denied the therapy. Mr. Redmond suggests he did not know the extent of his injuries until he saw Dr. Sukin in September 2007. But claims accrue "even though the full extent of the injury is not then known or predictable." [Wallace, 549 U.S. at 391](#). Even assuming Mr. Redmond did not know the full extent of the injury until September of 2007, he was suffering pain in his hip in August 2006 and he was told prior to August 2007 that Defendants denied him needed therapy. His claims thus accrued prior to August 15, 2007 and accordingly are barred by the applicable statute of limitations.

III. CONCLUSION

Mr. Redmond failed to file his Complaint within the applicable statute of limitations. This is not a defect which could be cured by

amendment. Accordingly, Mr. Redmond's Complaint should be dismissed with prejudice.

A. "Strike" under [28 U.S.C. § 1915\(g\)](#)

The Prison Litigation Reform Act prohibits prisoners from bringing forma pauperis civil actions if the prisoner has brought three or more actions in federal court that were dismissed for frivolousness, maliciousness, or for failure to state a claim. [28 U.S.C. § 1915\(g\)](#). This case should be designated as a "strike" under this provision because the failure to file within the applicable statute of limitations constitutes a failure to state a claim upon which relief may be granted. [Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 920-921, 166 L.Ed.2d 798 \(2007\)](#).

B. Certification Regarding Appeal

The Federal Rules of Appellate Procedure provide as follows:

A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court-before or after the notice of appeal is filed-certifies that the appeal is not taken in good faith or finds that the party is not otherwise

entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding;

[Fed.R.App.P. 24\(a\)\(3\)\(A\)](#).

Analogously, [28 U.S.C. § 1915\(a\)\(3\)](#) provides "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." The good faith standard is an objective one. See [Coppedge v. United States, 369 U.S. 438, 445 \(1962\)](#). A plaintiff satisfies the "good faith" requirement if he or she seeks review of any issue that is "not frivolous." [Gardner v. Pogue, 558 F.2d 548, 551 \(9th Cir. 1977\)](#) (quoting [Coppedge, 369 U.S. at 445](#)). For purposes of [section 1915](#), an appeal is frivolous if it lacks any arguable basis in law or fact. [Neitzke, 490 U.S. at 325, 327](#); [Franklin v. Murphy, 745 F.2d 1221, 1225 \(9th Cir. 1984\)](#). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." [Walker v. O'Brien, 216 F.3d 626, 631 \(9th Cir. 2000\)](#).

The finding that Mr. Redmond failed to file within the applicable statute of limitations is so clear no reasonable person could suppose an

appeal would have merit. Therefore, this Court will certify that any appeal of this matter would not be taken in good faith.

Accordingly, the Court issues the following:

ORDER

1. Mr. Redmond's Motion for Leave to Proceed in Forma Pauperis (Court Doc. 1) is GRANTED.

2. The Clerk shall edit the text of the docket entry for the Complaint to remove the word "LODGED" and the Complaint is DEEMED FILED on August 20, 2010.

3. At all times during the pendency of this action, Mr. Redmond SHALL IMMEDIATELY ADVISE the Court of any change of address and its effective date. Such notice shall be captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only information pertaining to the change of address and its effective date, except if Mr. Redmond has been released from custody, the notice should so indicate. The notice shall not include any motions for any other relief. Failure to

file a NOTICE OF CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to [Fed.R.Civ.P. 41\(b\)](#).

Further, the Court issues the following:

RECOMMENDATIONS

1. Mr. Redmond's Complaint should be DISMISSED for failure to file within the applicable statute of limitations. The Clerk of Court should be directed to close this matter and enter judgment in favor of Defendants pursuant to [Rule 58 of the Federal Rules of Civil Procedure](#).

2. The Clerk of Court should be directed to have the docket reflect that this dismissal counts as a strike pursuant to [28 U.S.C. § 1915\(g\)](#) based upon Mr. Redmond's failure to file within the applicable statute of limitations.

3. The Clerk of Court should be directed to have the docket reflect that the Court certifies pursuant to [Rule 24\(a\)\(3\)\(A\) of the Federal Rules of Appellate Procedure](#) that any appeal of this decision would not be taken in good faith. Mr. Redmond's failure to file within

the applicable statute of limitations is so clear no reasonable person could suppose an appeal would have merit. The record makes plain the instant Complaint is frivolous as it lacks arguable substance in law or fact.

**NOTICE OF RIGHT TO OBJECT TO
FINDINGS & RECOMMENDATIONS AND
CONSEQUENCES OF FAILURE TO OBJECT**

Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), Mr. Redmond may serve and file written objections to these Findings and Recommendations within fourteen (14) days of the date entered as indicated on the Notice of Electronic Filing. Any such filing should be captioned "Objections to Magistrate Judge's Findings and Recommendations."

A district judge will make a de novo determination of those portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge and

may waive the right to appeal the District Court's order. [Martinez v. Ylst](#), 951 F.2d 1153 (9th Cir. 1991).

This is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to [Fed.R.App.P. 4\(a\)\(1\)](#), should not be filed until entry of the District Court's final judgment.

DATED this 15th day of September, 2010.

/s/ Keith Strong
Keith Strong
United States Magistrate Judge